No. 80-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

HECTOR GARCIA,

Petitioner,

versus

ALTON V. M. GLOOR, W. H. HAUBOLDT, JR., WILBURN F. GLOOR and GLOOR LUMBER & SUPPLY, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals For the Fifth Circuit

BRIEF IN OPPOSITION

NEIL NORQUEST
EWERS, TOOTHAKER, EWERS, ABBOTT, TALBOT, HAMILTON & JARVIS
P.O. Box 3670
McAllen, Texas 78501
Telephone: (512) 686-3771
Attorney of Record

SCOFIELDS' QUALITY PRINTERS P. O. BOX 53096 N. O., LA. 70153 - 504/822-1811

QUESTION PRESENTED FOR REVIEW

Whether an employer's refusal to accommodate employee preferences for linguistic expession which are shown to have been influenced by national origin constitutes per se adverse impact under Title VII.

INDEX

Page

Question Presented for Review i

Reply to Statement of the Case 2

Argument 4

[A] Response to the questions presented by Petitioner for review 4

[1] *The issues presented for review by Petitioner are much broader than either the Judgment or the Opinion of the Court of Appeals.* 4

[2] *The decision of the Court of Appeals actually rendered is in full accord with this Court's interpretations of Title VII.* 6

[B] Response to the reasons asserted by Petitioner for the granting of a writ 12

[1] *With respect to the first reason asserted.* 12

[2] *With respect to the second reason asserted.* 13

[3] *With respect to the third reason asserted.* 14

Conclusion 17

Certificate of Service 18

Appendix (portions of Statement of Record before the Court of Appeals) 1a

PREVIOUS PAGE WAS BLANK

CITATIONS

Cases: Page

Albermarle Paper Company v. Moody, 422 U.S. 405 (1975) 15

Baker v. California Land & Title Company, 507 F.2d 895 (9th Cir., 1974 Cert. den'd) 8,10

Berke v. Ohio Department of Public Welfare, 628 F.2d 980 (6th Cir. 1980) 16

Fagan v. National Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973) ....., 8-10

Furnco Construction Corporation v. Waters, 438 U.S. 567 (1978) 7,11,14

General Electric Company v. Gilbert, 429 U.S. 143 (1976) 8,9,15

Griggs v. Duke Power Company, 401 U.S. 424 (1971) 7,8,10,11,14

Lau v. Nichols, 414 U.S. 684 (1974) 7,8,10,13

McDonnell-Douglass v. Green, 411 U.S. 792 (1973) 7,9,13,15

Meyer v. Nebraska, 262 U.S. 399 13

Mopkins v. St. Louis Die Casting Corp., 423 F.Supp. 132 (E.D. Mo. 1976) 9

Nashville Gas v. Satty, 434 U.S. 136 (1977) 8,14

CITATIONS (Continued)

Page

Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084 (5th Cir. 1975) 8,10

Statutes:

42 U.S.C. 2000e-2(a) 11

No. 80-810

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

HECTOR GARCIA,
Petitioner,

versus

ALTON V. M. GLOOR, W. H. HAUBOLDT, JR.,
WILBURN F. GLOOR and
GLOOR LUMBER & SUPPLY, INC.,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION

Come now Respondents, Alton V. W. Gloor, W. H. Hauboldt, Jr., Wilburn F. Gloor and Gloor Lumber and Supply, Inc., and respectfully pray that Petitioner's request for the issuance of a Writ of Certiorari herein be denied.

REPLY TO STATEMENT OF THE CASE

The Petitioner herein, a third-generation American citizen who completed the first semester of the tenth grade in Texas public schools (Brief 3D)[1] is fluent in English, has an easy command of the terms and usages of the English language, uses good grammar and syntax, and has no difficulty in being understood when speaking in English. The Court of Appeals noted that the Petitioner was fully bilingual and chose deliberately to speak Spanish instead of English while at work (Brief 10D, 11D, 15D, 16D, 17D, and 22D).

The testimony of Professor Chavira, who was called by Petitioner to testify about whether the Respondent's language policy had a discriminatory effect, was to the effect that the policy itself would *not* be discriminatory; any discrimination would have to come in the manner of its enforcement. (A. pp. 1a-2a). In the course of Chavira's testimony, the Trial Court asked him whether he thought the rule *itself* was arbitrary. (A. pp. 1a-2a). The witness replied:

> "That's why I said it would depend on how it's enforced. . . . If I were to walk in, you know, *and I speak fluent English, but I choose to speak only Spanish,* that's one thing. But if . . . I was looking for a part that I *did not know the English equiv-*

---

1 References to portions of Petitioner's Brief and the Appendicies thereto will be designated "(Brief ____)", and references to the Appendix hereto will be designated "(A ____)".

> *alent of*, and I would say, 'Donde esta', or 'where is the blank', again, it would depend on how the enforcement would come about. *This* is where the arbitrariness would come in."[2]

Thus, the only evidence (other than Petitioner's own testimony) concerning the effect of the Respondent's language policy as enforced against a fully bilingual employee is that, so enforced, it would be reasonable and not discriminatory. The Trial Court found that the policy as enforced did not operate to discriminate against Petitioner, (Brief 2B), and the Court of Appeals found that the policy did not forbid cultural expression to persons for whom compliance with it might impose hardship (Brief 16D) and that the evidence in the instant case would *not* support a finding that it either imposed burdensome terms and conditions of employment upon Petitioner or that it produced an atmosphere of racial and ethnic oppression. (Brief 16D). There was no evidence of any of Respondent's thirty other Spanish-surnamed employees ever being discharged or even reprimanded for violations of the policy, which was expressly approved and endorsed by Mexican-American supervisors and Directors of the Corporation (A. pp. 2a-3a).

Although the Court of Appeals did not deem it necessary to re-examine the issue of whether the

---

2 Emphasis Respondent's throughout unless otherwise indicated.

language policy was justified by a valid business necessity, the Trial Court found that it was (Brief 2B). The Courts further found that the Petitioner had willfully ". . . violated the language policy at every opportunity since the time of his hiring according to his own testimony." (Brief 2B).

ARGUMENT

[A] Response To The Questions Presented By Petitioner For Review (Brief 1)

[1] *The issues presented for review by Petitioner are much broader than either the Judgment or the Opinion of the Court of Appeals.*

Petitioner states the first question for review herein to be whether language is a national origin characteristic, (Brief 1)[3] and represents the holding of the Court of Appeals to be that language cannot be equated with national origin (Brief 11). The much narrower holding of the Court was that an employer's refusal to accommodate the language *preferences* of a fully bilingual or multilingual employee does not constitute national origin discrimination. (Brief 2-2D). As the Court stated:

---

3 The Petitioner's position before the Court of Appeals (as summed up by that Court) was that an employer's refusal to accommodate his employee's *choice* of linguistic expression constitutes discriminatory conduct if the employee can prove that his choice was influenced by his national origin (Brief 10D).

> "Our opinion does *not* impress a judicial imprimatur on all employment rules that require an employee to use or forbids him from using a language spoken by him at home or by his forebears. We hold only that an employer's rule forbidding a bilingual employee to speak anything but English in public areas while on the job is not discrimination based on national origin *as applied to a person who is fully capable of speaking English and chooses not to do so in deliberate disregard of his employer's rule.*" (Brief 22D).

Throughout its opinion, the Court of Appeals *distinguished* this case from situations in which employees might suffer discrimination on the basis of a language handicap or other circumstances beyond their control. Hardship, inadvertence and inability were not a part of this case. The Court made it clear that situations in which an employee might, for example, "inadvertently slip" into using a more familiar tongue (Brief 17D), not have the ability to speak English (Brief 17D), or in which the rule "might impose hardship" upon employees (Brief 16D) were not under consideration. The Equal Employment Opportunity Commission itself, in proposing Regulation §1606.7, recognized that such distinction existed in the instant case and stated that the principles set forth in its proposed regulation do *not* conflict with the Court of Appeals' decision herein. (Brief 6E). Petitioner's misquotation of the Honorable Court of Appeals at page 11 of his brief therefore

exemplifies his misconstruction of the Court's holding in the instant case.[4]

In the questions presented for review, the Petitioner thus addresses issues which are much broader than the decision actually rendered by the Court.

[2] *The decision of the Court of Appeals actually rendered is in full accord with this Court's interpretations of Title VII.*

While this Court has held that even facially neutral employment practices cannot stand when, by virtue of disadvantageous conditions associated with protected Title VII classifications they have the *effect* of discriminating against persons within such classifications,

---

4 Petitioner misquotes the Court as having said, at page 268 of the Opinion, that:

". . . neither the statute nor common understanding equate national origin with language. . ." (Brief 11)

whereas the Court's actual statement was that:

"neit' er the statute nor common understanding equates national origin with *the* language *that one chooses to speak.*" at page 268.

[Petitioner also:

(a) attributes to the Court the term "mere preference *for his native language*" (Brief 14), although no such statement appears in either of the Court's opinions, and

(b) makes the misstatement that the EEOC promulgated proposed revisions in its guidelines partly in response to the Fifth Circuit decision in *Garcia v. Gloor* (Brief 17), whereas the EEOC actually stated that the principles set forth in its guidelines (§1606.7) do *not* conflict with the Fifth Circuit's decision herein. (Brief 6E)]

(*Griggs v. Duke Power Company*, 401 U.S. 424 (1971)) it has never interpreted Title VII to require the accommodation of employee *preferences* which are merely shown to have been *influenced* by race, sex or national origin. On the contrary, the concern of this Court that deficiencies associated with minority citizens not be allowed to work a cumulative and invidious burden on them for the remainder of their lives has been borne of a recognition that such deficiencies are the result of circumstances *beyond the control* of such citizens. *Griggs v. Duke Power Company, supra; McDonnell-Douglass v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corporation v. Waters*, 438 U.S. 567 (1978); *Lau v. Nichols*, 414 U.S. 684 (1974).

In *Griggs* this Court held that the provisions of Title VII proscribes not only overt discrimination but also practices that are fair in form but discriminatory in operation. In determining that the intelligence tests used in *Griggs* constituted employment practices that were "discriminatory in operation", however, this Court noted that the Petitioners therein had long received inferior education in segregated schools, and that as a result, they fared worse than whites on standardized tests. (at p. 430). Discriminatory impact was thus shown to exist by the fact that certain minority citizens had been denied equal opportunities on the basis of circumstances *beyond their control*. This was explicitly restated in *McDonnell-Douglass v. Green, supra*, in the following words:

> "*Griggs was rightly concerned the childhood deficiencies* in the education and background of minority citizens *resulting from forces beyond their control,* not be allowed to work a cumulative and invidious burden on such citizens for the remainder of their lives." (at p. 806).[5]

Similarly, this Court held in *Lau v. Nichols, supra,* that the failure of a school district to take affirmative steps to rectify a language *deficiency* could amount to discrimination where the *inability* to speak and understand the English language excluded national origin — minority group children from effective participation in the educational program offered by the district. Clearly, the Court's concern was, once again, that linguistic *deficiencies* not be allowed to work an invidious burden upon minority citizens.

Cases such as *Griggs* and *Lau* provide a sharp contrast to cases such as the instant one, wherein an employer's refusal to accommodate employee preferences have formed the basis for discrimination charges. *General Electric Company v. Gilbert,* 429 U.S. 143 (1976); *Nashville Gas v. Satty,* 434 U.S. 136 (1977); *Willingham v. Macon Telegraph Publishing Co.,* 507 F.2d 1084 (5th Cir. 1975); *Baker v. California Land & Title Co., supra, Fagan v. National*

---

5 The 9th Circuit Court of Appeals independently drew the same conclusion when it stated, in its opinion in *Baker v. California Land & Title Company,* 507 F.2d 895 (9th Cir., 1974 Cert. den'd), that:

"The Court [in *Griggs*] was addressing itself to characteristics which the applicant, otherwise qualified, *had no power to alter.*" at p. 897.

Cash Register Co., 481 F.2d 1115 (D.C. Cir. 1973); *Mopkins v. St. Louis Die Casting Corp.*, 423 F.Supp. 132 (E.D. Mo. 1976).

In *General Electric, supra,* this Court held that an employer's disability plan which provided non-occupational sickness and accident benefits to all employees but excluded disabilities arising from pregnancy did not violate Title VII absent an indication that the pregnancy exclusion was a pretext for discriminating against women.[6] In so holding, the Court noted at p. 136 that:

> "Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a 'disease' at all, and *is often a voluntarily undertaken and desired condition.*"

Likewise in *McDonnell-Douglass v. Green, supra,* this Court distinguished a situation where deficiencies arising from circumstances beyond the control of minority citizens form the basis for discrimination from a situation wherein an employee voluntarily engages in disruptive activities against a potential employer. (*id.*, at page 806).

---

6 In the instant case, the Courts below found that the rule in question was *not* used as a pretext for discriminating on the basis of national origin (Brief 2B, 10D, and 17D).

In cases such as *Willingham v. Macon Telegraph Publishing Company, supra, Baker v. California Land & Title Co., supra,* and *Fagan v. National Cash Register Co., supra,* the courts have consistently held that the refusal of employers to accommodate employee preferences are more closely related to the employer's choice of how to run his business than to the equality of employment opportunity. In doing so, they have stated that the primary purpose of Title VII was to prevent discrimination on the basis of immutable characteristics — characteristics or conditions arising from circumstances beyond the control of the employee.

The essential distinction between a preference and a handicap, recognized in cases such as *Willingham, Baker,* and *Fagan,* reaches to the very heart of Title VII. The courts therein have recognized, as has this Court in cases such as *Griggs* and *Lau,* that the authors of Title VII intended by its enactment to prohibit employment practices having the intent (or effect) of denying employment opportunities on the basis of certain characteristics or conditions which people cannot help. The essential justice of the Act is readily perceived when seen in these terms, just as it was by Petitioner's own expert witness, who independently drew the same distinction between choice and ability (A. pp. 1a-2a). Absent a demonstrated justification, equal access to the job market and its benefits should not be denied to any person on the basis of certain circumstances which he cannot alter, those being his race, his sex, or the fact that he or his ancestors happen to have come from a

particular country. (42 U.S.C. 2000e-2(a)). Obviously, those characteristics, qualities, properties and attributes historically or statistically associated with a particular race, sex, or national origin may not serve as a basis for the erection of artificial barriers to employment equality. *Griggs, supra.* There is a fundamental distinction however, between barriers which exist despite an individual's efforts to overcome them and those which exist as a matter of choice, and the recognition of that distinction was the hallmark of the Honorable Court's opinion herein.

Noting that the evidence in the instant case did not support a finding that the English-only rule either imposed burdensome terms and conditions of employment or produced an atmosphere of racial and ethnic oppression (Brief, 16D), the Court pointed out, time and again, that the Petitioner was fully bilingual, and that his decision to speak one language or another was purely a matter of personal preference. (Brief 10D, 11D, 16D, 17D, and 22D). Noting also that, in some circumstances, the *ability* to speak or the speaking of a language other than English might be equated with national origin (Brief 17D), the Court held that there is no disparate impact if the challenged rule is one that the affected employee can readily observe so that nonobservance is a matter of individual preference. (Brief 15D). The Court concluded, as did this Court in *Furnco, supra,* that, in the absence of a showing of discrimination,

"Judges who have neither business experience nor the problem of meeting employees' payroll, do not have the power to pre-empt an employer's business judgment by imposing a solution that appears less restrictive." (Brief 18D).

[B] Response To The Reasons Asserted By Petitioner For The Granting Of A Writ (Brief 6-19)

[1] *With respect to the first reason asserted:*

Petitioner's allusions to the "suppression of the Spanish language in the Southwest", the "failure of society and government to recognize the Spanish language as the most salient characteristic of the Mexican-American," and the "extent to which other important characteristics of Mexican-Americans and other national origin groups will be scrutinized", are inapposite to the case at bar because the scope of inquiry herein was limited by the facts of the case to the question of whether an employer's refusal to accommodate language preferences — not disabilities or hardships — constituted discrimination within the meaning of Title VII. The Honorable Court of Appeals held that the evidence did *not* support a finding that the rule was burdensome or produced an atmosphere of racial or ethnic oppression. (Brief, 16D). Unless an employer's refusal to accommodate an employee's *choice* of linguistic or cultural expression is to be equated with racial or

ethnic oppression, the decision of the Court of Appeals has no bearing upon the problems alluded to by Petitioner.

Petitioner's citation of the *McDonnell-Douglass* and *Griggs* cases (Brief, p. 7) as illustrative of Title VII's concern for language characteristics is also inapposite, for the reasons heretofore stated.

[2] *With respect to the second reason asserted:*

Petitioner's second reason for urging the granting of a Writ herein is his desire to settle the status of language as a national origin characteristic. (Brief, p. 9). Petitioner thus again misstates the issue to be whether language *per se* is a protected characteristic of national origin under Title VII, and once again, therefore, the authorities cited by Petitioner do not apply to the facts herein.

Lau v. Nichols, supra, (Brief, p. 10) dealt with abilities, not preferences, and underscored Title VII's concern that language handicaps not be allowed to work an invidious burden upon those who possess them. The constitutional issue addressed in the case of *Meyer v. Nebraska,* 262 U.S. 399, (Brief, p. 10) has no bearing upon the issue presented here. Likewise, Petitioner's reference to Senator Williams' statement that Spanish-speaking immigrants who have come to the United States ". . . have yet to be assimilated. . ." lends no support to the proposition that a third-generation American Citizen

(Brief, p. 3D) who has *been* linguistically assimilated must be at all times accorded his preference of linguistic or cultural expression.

In sum, the authorities cited by Petitioner are not in conflict with the actual holding of the Court herein or with its statement that "neither the statute nor common understanding equates national origin with *the* language *that one chooses to speak*" (at page 268).

[3] *With respect to the third reason asserted:*

Petitioner asserts that the decision of the Court of Appeals herein conflicts with decisions of this Court interpreting Title VII.

Petitioner alleges, citing the *Griggs, Nashville Gas Company,* and *Furnco* cases, *supra,* that the Court of Appeals herein imposed a new burden on the Petitioner to prove that he had a legal right to exercise a linguistic preference ". . . regardless of the impact of the rule on national origin. . .". (Brief p. 14) The basis for such assertion is found in Petitioner's own interpretation of the term "national origin" to include one's preference for linguistic expression. Petitioner concludes that where such preference is shown to have been influenced by his national origin the burden ". . . must remain with [the] employer to justify his actions." (Brief, p. 15). Petitioner's "burden of proof" argument is thus a simple extension of his concept of discrimination; i.e. where an employee can prove that a particular prefer-

ence or predilection has been influenced by his national origin, the evidentiary burden shifts to his employer to prove that a refusal to accommodate such preference is justified by a valid business necessity.

As has been pointed out, there is no support to be found in Title VII or any of this Court's interpretations thereof for such proposition. An employee who merely proves that such a preference exists and has not been accommodated by his employer falls far short of his traditional burden of establishing that the acts complained of constitute discrimination in violation of Title VII. *General Electric Company v. Gilbert, supra; Albermarle Paper Company v. Moody,* 422 U.S. 405 (1975); *McDonnell-Douglass Corp. v. Green, supra.*[7]

As with the case of his "burden of proof" argument, Petitioner's "retaliation" and "rebuttal" arguments (Brief, p. 16) rest entirely upon the erroneous assumption that discriminatory impact is proved by a showing that an employer has refused to accommodate employee preferences which have been influenced by national origin. Since the assumption is faulty, the arguments fail.

Petitioner further asserts in support of his third ground for granting a Writ herein, that numerous re-

---

7 As it was noted in *General Electric, supra:* "[those] who seek to establish discrimination have the traditional civil litigation burden of establishing that the acts they complain of constituted discrimination in violation of Title VII." at p. 138.

ported, unreported, and pending language discrimination cases have added to the "confusion" perceived by Petitioner herein. (Brief, p. 17 and 18). Most such cases are inapposite, and many involved language deficiencies — not preferences — and are as different from the instant case as were the other authorities cited by Petitioner herein. (The case of *Berke v. Ohio Department of Public Welfare*, 628 F.2d 980, (6 Circuit 1980), for example, involved an employee's inability to rid herself of a pronounced accent (at p. 980), as a result of which she was denied two positions within the Ohio Department of Public Welfare. The employee did not assert that she had been denied such positions because of her *preference* to speak with a pronounced accent.)

The confusion perceived by Petitioner thus results not from inconsistent court decisions but rather from the rigidity of Petitioner's own analysis of how language fits into the scheme of Title VII. Such analysis, which proceeds from the assumptions heretofore discussed, fails to provide the flexibility necessary to a proper application of Title VII to the spectrum of employer/employee relationships, fails to recognize the limits of the latitude given to courts in governing such relationships, and, most importantly, fails to perceive the basic distinction (which was perceived by Petitioner's own expert witness) between discrimination on the basis of characteristics which people cannot help and the accommodation of preferences. So failing, it would

proceed to a result herein which is contrary to both the letter and the spirit of Title VII.

CONCLUSION

Wherefore, Respondents respectfully pray that the request of Petitioner that a Writ of Certiorari issue herein, be in all things denied.

Respectfully submitted,

EWERS, TOOTHAKER, EWERS,
ABBOTT, TALBOT, HAMILTON
& JARVIS
P.O. Box 3670
McAllen, Texas 78501
Telephone: (512) 686-3771

NEIL NORQUEST
Attorney of Record

CERTIFICATE OF SERVICE

I hereby certify that on this the ____ day of December, 1980, I have mailed three true and correct copies of the foregoing Brief in Opposition to Counsel of Record, James A. Herrmann, Texas Rural Legal Aid, Inc., 305 E. Jackson, Suite 206, Harlingen, Texas 78550, by depositing said copies in the U.S. Mails, certified mail, return receipt requested.

NEIL NORQUEST

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 77-2358

HECTOR GARCIA, ETC.,
Plaintiff-Appellant,

versus

ALTON V. W. GLOOR, ET AL.,
Defendants-Appellees.

EXCERPTS FROM STATEMENT OF RECORD

[159] THE COURT: Don't you think the rule is kind of arbitrary, though?

[160] THE WITNESS: That's why I said it would depend on how it's enforced. This goes not only for this rule, it goes on all laws. They are rules. But then, how are they going to be enforced? If I were to walk in, you know, and I speak fluent English, but I chose to speak only Spanish, that's one thing, but if I were to go in, you know, and I was looking for a part that I did not know the English equivalent of, I would say, "Donde esta," or "Where is the blank?" Again, it would depend on how

the enforcement would come about. This is where the arbitrariness would come in.

* * *

[210] Q In connection with Gloor Lumber Company, the corporation, at the time Hector Garcia was employed and discharged, approximately what percentage of your employees had Mexican-American surnames?

A Approximately eighty percent.

Q Is that still true today?

A No, sir. We have a larger percentage. Now it's approximately eighty-five percent.

Q Who are the highest paid employees in your organization, that is to say, are some of them Mexican-Americans?

A Yes, sir. Wilburn is highest in the organization, and he's followed by three other people that draw comparable salaries, one of which is Chris Ortiz.

Q Chris Ortiz is a Mexican-American?

* * *

[214] A Yes, sir. Lelo Gonzalez is another one.

Q Lelo Gonzalez is the Director of the company, isn't he?

A Yes, sir.

Q Would he be Director of the company if he was not proficient in English enough to converse and com-

municate accurately and intelligently with other English-speaking people?

A He wouldn't be in that position, no, sir.

Q All right. Incidentally, he's on the Board of Directors. Was he in favor of this Spanish-speaking policy?

A Very much, yes, sir.

Q And as a member of the Board of Directors, he gave his approval to it?

A Yes, sir.

* * *

[222] Q And if someone made a slip, you're not going to fire them for that?

A No, sir.

Q It's the willful violation like Hector's where he knew the rule and he purposely violated it and made no attempt to comply with the rule, is what you're talking about?

A That's correct.